86-227

No. _____

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

VICTOR RIDLEY,
Specialist Four, United States Army,
Petitioner

v.

THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BROOKS B. LA GRUA
Colonel, Judge Advocate General's Corps (JAGC)
United States Army
Defense Appellate Division
5611 Columbia Pike
Falls Church, VA 22041
(202) 756-1807
Counsel of Record

and

ANNAMARY SULLIVAN
Captain, JAGC
United States Army

PAMELA G. MONTGOMERY
Captain, JAGC
United States Army

QUESTION PRESENTED

Whether the petitioner's sixth amendment right of confrontation was violated when, over defense objection, an evaluative police laboratory test, which was the sole government evidence, was admitted into evidence, without the testimony of the laboratory analyst who conducted the test.

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Supreme Court of the United States

OCTOBER TERM, 1986

No. ———

VICTOR RIDLEY,
Specialist Four, United States Army,
Petitioner

v.

THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Specialist Four Victor Ridley, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals entered in this proceeding.

OPINIONS BELOW

The opinion of United States Court of Military Appeals is reported at —— M.J. —— (C.M.A. 1986) (Appendix A). The opinion of the Army Court of Military Review is unpublished, SPCM 20471 (A.C.M.R. 30 Jan. 1985) (Appendix B).

JURISDICTION

The judgment of the Court of Military Appeals was entered on June 16, 1986, affirming petitioner's conviction dated March 23, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States provides:

Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."

Military Rule of Evidence, 803(6) admits:

Records of regularly conducted activity. A memorandum, report, record, or data compilation, . . . if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, ... Among those memoranda, reports, records, or data compilations normally admissible pursuant to this paragraph are forensic laboratory reports. . . .

STATEMENT OF THE CASE

On July 8, 1983, First Lieutenant (1LT) Bryan Sampson smelled what he considered to be the aroma of marijuana coming from a room assigned to Specialist Four (SP4) Robert E. Anthony and SP4 John N. Treadway. A prompt investigation of the room revealed the presence of Private First Class (PFC) Anthony Hunter, SP4 Robert E. Anthony, and the petitioner. Marijuana was found on and under SP4 Anthony's bed, in his clothes, and in his wall locker (R. 33, 66, 99, 100-101, Prosecution Exhibits 1, 3-7 inclusive). No evidence of marijuana was found on or near the petitioner (R. 94) in spite of an extensive search of petitioner's shirt, boots, pants pockets, wallet, and hat (R. 55). A search of the petitioner's room met with negative results.

On July 13 or 14, 1983, the petitioner, Specialist Four Anthony and the others provided urine specimens to the Alcohol and Drug Testing representatives. Specialist

Four Anthony's urine sample did not reveal THC,[1] (R. 201a) while the report of the petitioner's urinalysis reflected a result of "Positive THC" (Prosecution Exhibit 8).

Petitioner was tried by a military judge sitting as special court-martial on November 3 and December 5, 1983. Contrary to his pleas, he was found guilty of wrongful use of marijuana and willful disobedience of an order to submit to a urinalysis test, in violation of Articles 134 and 90 of the Uniform Code of Military Justice, 10 U.S.C. §§ 934 and 890. The court sentenced him to a bad conduct discharge, confinement for two months, partial forfeitures, and reduction to the grade of Private E-1. The Army Court of Military Review affirmed the findings and sentence (Appendix B).

At trial, the petitioner's defense counsel objected to the admission of Prosecution Exhibit 8 (urinalysis custody and report record) stating:

> *I did not have any opportunity to cross-examine the persons who actually performed the urinalysis.* And so, we object on the basis that it's not the best evidence and *does not give the accused the opportunity to cross-examine.*

R. (170) (emphasis added).

The military judge denied the motion, and admitted the laboratory report which, other than petitioner's mere presence in the room, was the sole evidence of marijuana use by the petitioner.

The issue granted by the United States Court of Military Appeals, as a prerequisite to this Court's jurisdiction, was as follows:

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[1] THC identifies Delta-9-Tetrahydroxycannibinol, a metabolite whose presence tends to show that the person "had at some prior time ingested or inhaled marihuana." Murray v. Haldeman, 16 M.J. 74, 76 (C.M.A. 1983).

WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF THE APPELLANT BY ADMITTING IN EVIDENCE PROSECUTION EXHIBIT 8 (URINALYSIS CUSTODY AND REPORT RECORD) OVER DEFENSE OBJECTION.

REASONS FOR GRANTING THE WRIT

The Court of Military Appeals based its affirmation of petitioner's conviction of wrongful use of marijuana on the premise that the admission of a police laboratory report of urinalysis without the testimony of the laboratory analyst who conducted the test is not violative of the confrontation clause of the sixth amendment. This viewpoint is contrary to the policy announced more than ninety years ago by the Court that the purpose of the confrontation clause was to prevent "depositions or *ex parte* affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness. . . ." *Mattox v. United States*, 156 U.S. 237, 242 (1895). The laboratory report introduced in this case to prove the "single most damaging fact against the [petitioner] [2] fall[s] into the category of the dreaded, *ex parte* affidavit." [3] *State v. Henderson*, 554 S.W.2d 117, 120 (Tenn. 1977).

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[2] In this case, and in a number of the reported cases, the laboratory report is directly relevant to an essential element of the offense. See United v. Scholle, 553 F.2d 1109, 1123-25 (8th Cir. 1977), *cert. denied*, 434 U.S. 940 (1977); United States v. Frattini, 501 F.2d 1234, 1235-37 (2d Cir. 1974); United States v. Parker, 491 F.2d 517, 520-21 (8th Cir. 1973), *cert. denied*, 416 U.S. 989 1974); United States v. Miller, 23 C.M.A. 247, 249-50, 49 C.M.R. 380, 381 (1974); United States v. Evans, 21 C.M.A. 579, 45 C.M.R. 353 (1972).

[3] The laboratory report in this case is perhaps more harmful than an *ex parte* affidavit since the results were not recorded under oath, nor was the identity of the laboratory analyst provided. The

With the increasing use of scientific evidence, and the concomitant strain on police laboratories, evaluative police laboratory reports do not meet the constitutional requirements of reliability.[4] This petition presents the Court with an opportunity to determine the constitutional limits of evaluative police laboratory reports which comprise an essential element of an offense. Appellate courts are divided on this issue.[5]

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laboratory report is analogous to the psychiatric report held inadmissible in Phillips v. Neil, 452 F.2d 337 (6th Cir. 1971), *cert. denied*, 409 U.S. 884 (1972) where the psychiatric report did not indicate who made the opinion or the basis relied upon.

[4] *See* Imwinkelried, *The Constitutionality of Introducing Evaluative Laboratory Reports Against Criminal Defendants*, 30 Hastings L.J. 621 (1979) [hereinafter cited as *Imwinkelried*].

[5] The following courts do not find a constitutional violation: Kay v. United States, 255 F.2d 476 (4th Cir.), *cert. denied*, 358 U.S. 825 (1958) (blood alcohol report admitted under certificate in a drunk driving case); State v. Cosgrove, 181 Conn. 562, 436 A.2d 33 (1980) (state toxicologist's report that substance is marijuana); Howard v. United States, 473 A.2d 835 (D.C. Cir. 1984) (Drug Enforcement Agency chemist's certified report that substance is heroin); State v. Malsbury, 186 N.J. Super. 91, 451 A.2d 421 (1982) (county forensic laboratory report that substance is marijuana). The following courts do find a constitutional violation: State v. Henderson, 554 S.W.2d 117 (Tenn. 1977) (state toxicology report identifying substances to be lysergic acid diethylamide and marijuana); Commonwealth v. McCloud, 457 Pa. 310, 322 A.2d 653 (1974) (autopsy report improperly admitted to prove legal causation of death); Gregory v. State, 40 Md. App. 297, 391 A.2d 437 (1978) (report of medical staff conference improperly admitted to show the defendant was criminally responsible); Moon v. State, 300 Md. 354, 478 A.2d 695 (1984), *cert. denied*, 105 S.Ct. 1170 (1985) (blood alcohol and osmolality tests in an automobile manslaughter case). *See also* United States v. Oates, 560 F.2d 45 (2d Cir. 1977) (chemist report is not a business record under Federal Rule of Evidence 803(6) [Fed. R. Evid.] and also excluded under Fed. R. Evid. 803(8).

I. THE POLICE LABORATORY REPORT OF URINALYSIS DOES NOT BEAR THE "INDICIA OF RELIABILITY" OF MORE TRADITIONAL BUSINESS RECORDS SINCE IT WAS MADE FOR ITS "POTENTIAL LITIGATION VALUE."

The hearsay exception for regularly kept business records is justified by the unusual reliability of their accuracy.[6] Such records are periodically reviewed by audits or other validating procedures. Organizations routinely depend on the accuracy of these records in order to function properly. McCormick on Evidence § 306 (3d Ed. E. Cleary, 1984). For example, the standardization of the practice of recording medical facts concerning patients has resulted in certain hospital records being accorded a high degree of reliability, and life and death decisions are based on their accuracy.[7] *Id.* § 313.

The determination that THC was present in the petitioner's urine is an opinion, based on inferences made during the analysis of the urine. It is an evaluation, not a "fact" in the common usage of that term. *Id.* § 12.

Further, the police laboratory report, unlike routine hospital records or other regularly kept records, cannot be said to realistically be made for any purpose other than its "potential litigation value." *State v. Henderson*, 554 S.W.2d 117, 120 (Tenn. 1977).

The purpose of the police laboratory report introduced in this case is no different than that condemned in *Pal-*

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[6] In Mancusi v. Stubbs, 408 U.S. 204, 213 (1972) this Court stated that the confrontation clause requires an extrajudicial hearsay statement to bear sufficient "indicia of reliability" to provide an adequate basis to test the truthfulness of the statement before it is admissible.

[7] Courts can limit the use of hospital records where the diagnostic opinion is speculative, and not based on objective data. *See* Boland v. Jando, 395 S.W.2d 206 (Mo. 1965) (interpretation of X-rays, where record stated "could be a small chip fracture," excluded by the court as being speculative).

mer v. Hoffman, 318 U.S. 109 (1943) where the Court held inadmissible a railroad engineer's written accident report. The Court stated, "[the report] is not a record made for the systematic conduct of the business as a business. . . . Unlike payrolls, accounts receivable, accounts payable, bills of lading and the like, these reports are calculated for use essentially in the court, not in the business. Their primary utility is in litigating, not in railroading." *Id.* at 113-114.

In *United States v. Oates*, 560 F.2d 45 (2d Cir. 1977), the court held that a laboratory report is inadmissible as a regularly kept record under Federal Rule of Evidence 803(6).[8] The court there stated:

> If we were to construe FRE 803(6) in an overly literal fashion and find that the chemist's report and worksheet constituted "business records" under that rule, the collision [between the Rule and the Confrontation Clause of the Constitution] which the Congress so assiduously tried to "avoid inviting" would be that much nearer to occurring.

Id. at 80.

The laboratory report in this case is not analogous to a bill of lading or payroll record. The report was not made as part of the laboratory's internal control system, but as an analysis of evidence seized once the petitioner was suspected of committing an offense.[9] Nor can it be

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[8] In contrast to Fed. R. Evid. 803(6), Mil. R. of Evid. 803(6) has codified the Court of Military Appeals' decisions and included forensic laboratory reports as business records. Mil. R. Evid. 803(6) has also deleted the provision which excluded a record "made principally with a view to prosecution, or other disciplinary or legal action." *See* Analysis to Mil. R. Evid. 803(6).

[9] Several courts have held that when a record is made for a purpose other than a regular business purpose as was the laboratory

said that the laboratory analyst [10] was merely seeking to "establish an instrinsically neutral fact." *United States v. Evans*, 21 C.M.A. 579, 45 C.M.R. 353 (1972). The laboratory report indicating the presence of THC in the urine was an essential element which the government had the burden to prove beyond a reasonable doubt.

To allow the government to prove the very essence of the offense by means of an unsworn written report untestable by cross-examination, instead of calling a witness who has not been shown to be unavailable,[11] is the antithesis of the adversarial system from which truth emerges. *See State v. Henderson*, 554 S.W. 117 (Tenn. 1977) (admission in evidence of a toxicology laboratory report through a witness other than one who performed the test violated the defendant's constitutional right of confrontation).

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report in this case, it does not fall within the hearsay exception for regularly kept records and should not be admitted. *See* United States v. Kim, 193 App. D.C. 370, 595 F.2d 755 (1979); Seattle First Nat. Bank v. Randall, 532 F.2d 1291, 1296 (9th Cir. 1976); Hiram Ricker and Sons v. Students International Meditation Society, 501 F.2d 550 (1st Cir. 1974); United States v. Middlebrooks, 431 F.2d 299, 302 (5th Cir. 1970), *cert. denied*, 400 U.S. 1009 (1971).

[10] *See* the vigorous dissent in State v. Rhone, 555 S.W.2d 839 (Mo. 1977), where Judge Bardgett of the Supreme Court of Missouri states that the laboratory analyst must be viewed as "a member of the prosecuting team." *Id.* at 847.

[11] Military case law holds that the government is not required to call the laboratory analyst as a witness. Instead the defense may request the laboratory analyst as a witness, after making a showing that possible discrepancies may exist in the report. United States v. Vietor, 10 M.J. 69 (C.M.A. 1980); United States v. Strangstalien, 7 M.J. 225 (C.M.A. 1979). This viewpoint confuses the confrontation clause with the compulsory process clause and effectively abolishes the accused's right of confrontation. *See* Gilligan and Lederer, *Compulsory Process and Confrontation*, 101 Mil. L. Rev. 1, 76-79 (1983).

II. THERE IS A SUBSTANTIAL LIKELIHOOD THAT THE POLICE LABORATORY REPORT OF URINALYSIS CONTAINS SUBSTANTIVE ERROR AND THUS THE REPORT IS CONSTITUTIONALLY UNRELIABLE.

Scientists have only recently been able to detect THC metabolites in urine. After several unsuccessful efforts to develop a test, several immunoassay tests were developed in the mid-1970's.[12] In the early 1980's Doctors John Whiting and William W. Manders, of the Armed Forces Institute of Pathology, developed a test using a gas chromatograph equipped with a flameionization detector [13] to detect THC metabolites after urine samples have been screened by radioimmunoassay.[14] After development of the GC/FID, the Department of Defense issued a memorandum which eliminated the ban against utilizing compulsory drug analysis results in disciplinary proceedings.[15]

Dr. William Manders, one of the developers of GC/FID, has stated that "basing punishment on just one positive urinalysis is not right. There is too much margin for error. These tests were never meant to be used as evidence." [16]

Studies of GC/FID and radioimunoassay have shown that both procedures are screening tests and insufficiently reliable to make the determination of the presence of the THC metabolite in urine. These tests cannot distinguish the THC metabolite from other compounds in

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[12] *See* Wiesner, *Urinalysis: Defense Approaches,* 15 The Advocate 114 (1982).

[13] Hereinafter referred to as GC/FID.

[14] Whiting and Manders, *Confirmation of a Tetrahydrocannibinol Metabolite in Urine by Gas Chromatograph,* 6 Journal of Analytical Toxicology, January/February 1982: [hereinafter referred to as *Whiting and Manders*].

[15] Department of Defense Policy Memorandum, Dec. 28, 1981.

[16] "Acquittal Won't Change Use of Drug Test," Army Times, Jan. 16, 1984.

the urine which react similarly to THC under test conditions.[17]

In addition to the unreliability of the laboratory tests themselves, studies have shown the fallibility of the police laboratories in determining accurate results. A panel of military and civilian experts in a study of four Army/Air Force laboratories found substantial rates of error. For example, at Fort Meade Laboratory, the panel found that prior to November 15, 1983, radioimmunoassay results confirmed only by GC/FID would be scientifically and legally supportable in less than ten percent of the cases.[18] *See* Review of Urinalysis Drug Testing Program, p. 20. The findings of the panel are comparable to those reported in 1974 by the Laboratory Proficiency Testing Program where in one test the laboratories were asked to determine if two blood stains shared a common origin, and only 37.4% of the laboratories reached the accurate conclusion. *See Imwinkelried, supra* n.4 at 636-637 reporting the results of the Project Advisory Committee, Laboratory Proficiency Testing Program, Supplementary Report (prepared for the United States Department of Justice) (on file with the Hastings Law Journal).

Considering the problems with urinalysis tests in accurately detecting THC metabolites in urine, the fallibility of police laboratories in determining accurate results, and the lack of cross-examination by the petitioner to question whether the tests were properly performed,

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[17] Review of Urinalysis Drug Testing Report by a Panel of Army and Civilian Experts in Toxicology and Drug Testing Legal Issues for the Surgeon General of the U.S. Army, December 12, 1983—Legal Addendum pp. 15-17. [hereinafter cited as *Review of Urinalysis Drug Testing Program*]

[18] The study also reported the accuracy rates at the three other laboratories ranged from 25%-95%. Review of Urinalysis Drug Testing Program *supra*, at p. 20.

whether the laboratory equipment was in proper working order, and the qualifications of the laboratory analyst, there is a substantial likelihood that the laboratory report admitted in evidence against the accused is erroneous.[19]

III. THE ADMISSION OF THE POLICE LABORATORY REPORT SUBSTANTIALLY PREJUDICED THE PETITIONER.

In this case, the laboratory report was "critical evidence . . . pertaining directly to the [petitioner's] ultimate guilt." *Gregory v. State*, 40 Md. App. 297, 391 A.2d 437, 455 (1978). Without the report, there is no direct evidence that the petitioner used marijuana. The only other evidence was his presence in a room which smelled of marijuana. Mere presence at the scene of a crime is not a sufficient basis of guilt. The laboratory report was "crucial" to the government's case and "devastating" to the defense case. *Dutton v. Evans*, 400 U.S. 74, 87 (1970). Its admisison as the sole evidence of an essential element of the offense violated the petitioner's sixth amendment right to confront and cross-examine the witnesses against him. *See State v. Matousek*, 287 Minn. 344, 178 N.W.2d 604 (1970). Since the laboratory report was the key evidence in the case against the petitioner, its admission was an error of constitutional dimensions that was not harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18 (1967).

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[19] The petitioner's test results were confirmed as positive by the gas chromotagraph/mass spectroscopy (Prosecution Exhibit 12 for identification), a test that is accepted in the scientific community as a means of identifying drugs. *See* Review of Urinalysis Drug Testing Program—Legal Addendum pp. 10-12. However, these test results were not admitted into evidence (R. 170).

CONCLUSION

For the reasons stated above, including the importance of the constitutional issue involved, the petition for certiorari should be granted. The resolution of the issue is critical to the preservation of an accused's constitutional right of confrontation and cross-examination.

Respectfully submitted,

BROOKS B. LA GRUA
Colonel, Judge Advocate
General's Corps (JAGC)
United States Army
Defense Appellate Division
5611 Columbia Pike
Falls Church, VA 22041
(202) 756-1807
Counsel of Record

and

ANNAMARY SULLIVAN
Captain, JAGC
United States Army

PAMELA G. MONTGOMERY
Captain, JAGC
United States Army

APPENDIX

APPENDIX

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 52087/AR
CMR Dkt. No. 20471

UNITED STATES,

Appellee

v.

VICTOR RIDLEY (396-74-3403),

Appellant

MEMORANDUM OPINION AND ORDER

Appellant was tried by special court-martial at Fort Ord, California, on November 3 and December 5, 1983. The military judge found appellant guilty, despite his pleas, of wrongful use of marihuana and willful disobedience of an order to submit to a urinalysis test, in violation of Articles 134 and 90, Uniform Code of Military Justice, 10 U.S.C. §§ 934 and 890, respectively. He was sentenced to a bad-conduct discharge, confinement for 2 months, partial forfeitures, and reduction to pay grade E-1. The convening authority approved this sentence and the Court of Military Review affirmed in a short-form opinion.

We granted review of the following issues:

I

WHETHER THE EVIDENCE IS SUFFICIENT AS A MATTER OF LAW AND FACT TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT WRONGFULLY AND KNOWINGLY USED MARIHUANA AS ALLEGED IN SPECIFICATION 1 OF CHARGE I.

II

WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF THE APPELLANT BY ADMITTING IN EVIDENCE PROSECUTION EXHIBIT 8 (URINALYSIS CUSTODY AND REPORT RECORD) OVER DEFENSE OBJECTION.

III

WHETHER THE EVIDENCE IS SUFFICIENT AS A MATTER OF LAW AND FACT TO PROVE BEYOND A REASONABLE DOUBT THAT ON OR ABOUT 29 SEPTEMBER 1983 THE APPELLANT WILLFULLY DISOBEYED A LAWFUL COMMAND OF 1LT SAMPSON TO SUBMIT TO A URINALYSIS TEST.

We have examined the record of trial in this case in light of *United States v. Harper*, 22 M.J. 157 (C.M.A. 1986), and resolve issue I against appellant. *See Jackson v. Virginia*, 443 U.S. 307 (1979). Moreover, we resolve issues II and III against appellant on the basis of *Murray v. Haldeman*, 16 M.J. 74 (C.M.A. 1983); *United States v. Porter*, 12 M.J. 129 (C.M.A. 1981); *United States v. Armstrong*, 9 M.J. 374 (C.M.A. 1980); and *United States v. Strangstalien*, 7 M.J. 225 (C.M.A. 1979). Accordingly, it is, by the Court, this 16th day of June, 1986,

ORDERED:

That the decision of the United States Army Court of Military Review is affirmed.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Army
Appellate Defense Counsel (MONTGOMERY)
Appellate Government Counsel (BENJAMIN)

UNITED STATES ARMY COURT OF MILITARY REVIEW

Before

McKAY, WATKINS, and LYMBURNER
Appellate Military Judges

SPCM 20471

7th Infantry Division and Fort Ord

G. C. Ryker, Military Judge

UNITED STATES,

Appellee

v.

Specialist Four VICTOR RIDLEY, 396-74-3403,
United States Army,

Appellant

Lieutenant Colonel Arthur L. Hunt, JAGC, and Captain Frank J. DiGiammarino, JAGC, were on the pleadings for appellant.

Colonel James Kucera, JAGC, Lieutenant Colonel Adrian J. Gravelle, JAGC, Lieutenant Colonel Thomas M. Curtis, JAGC, and Captain Thomas J. Benjamin, JAGC, were on the pleadings for appellee.

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30 January 1985

MEMORANDUM OPINION

Per Curiam:

The Court having found the approved findings of guilty and the sentence correct in law and fact and having determined on the basis of the entire record that they should be approved, such findings of guilty and the sentence are *AFFIRMED.*

FOR THE COURT:

/s/ William S. Fulton, Jr.
WILLIAM S. FULTON, JR.
Clerk of Court

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